

224370

FRANK JACOBS
DIRECT DIAL 212 692 1060
PERSONAL FAX 212 202 6413
E-MAIL fmjacobs@duanemorris.com

www.duanemorris.com

VIA FEDEX

Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

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Re: Town of Babylon and Pinelawn Cemetery – Petition to Reopen this Docket and
Confirm that the Board's Prior Decisions Remain Valid and Enforceable
Finance Docket No. 35057

Dear Secretary Quinlan

This letter is written on behalf of petitioners Town of Babylon and Pinelawn Cemetery. On December 18, 2008, we filed a petition to reopen this docket for the purpose of confirming that the Clean Railroads Act of 2008 did not affect the Board's prior rulings that, because Coastal Distribution LLC ("Coastal") is not a rail carrier or acting on behalf of a rail carrier, its facility is not within the Board's jurisdiction and is subject to state and local regulation. Coastal and New York and Atlantic Railway ("NYAR") filed their reply to the petition on January 7, 2009. One week later, the Board issued Ex Parte No. 684 concerning the Clean Railroads Act (the "CRA Decision"). Since the CRA Decision had not been rendered when our petition was filed, we request permission to submit this letter showing that the CRA Decision conclusively puts to rest the arguments Coastal and NYAR make in their reply.

Coastal and NYAR contend that the Clean Railroads Act is applicable to Coastal's facility – apparently because the facility is engaged in the transfer of solid waste (See NYAR and Coastal's Response to Petition to Reopen, "Reply," p. 1.) They also contend that "Congress has eliminated STB jurisdiction. . . over the permitting and operation of solid waste rail transfer facilities." (Reply, p. 4.) However, as the Board pointed out in the CRA Decision, "[t]he [Clean Railroads Act] preserves an important role for the Board by establishing a permitting process regarding siting." CRA Decision, p. 4. Coastal and NYAR are therefore mistaken that the Clean Railroads Act leaves the Board without any ongoing responsibility for solid waste rail transfer facilities.¹

¹ At page 5 of the CRA Decision, the Board refers to its "jurisdiction under the Clean Railroads Act." It later states that its "primary role" "under the Clean Railroads Act is to issue land-use exceptions permits for

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They are also mistaken that the Clean Railroads Act applies to Coastal. In the CRA Decision, the Board explained

The Clean Railroads Act applies only to solid waste rail transfer facilities. See section 10908(d). A solid waste rail transfer facility is defined as including the portion of a facility: (1) that is owned or operated by or on behalf of a rail carrier; (2) where solid waste is treated as a commodity transported for a charge; (3) where the solid waste is collected, stored, separated, processed, treated, managed, disposed of, or transferred; and (4) to the extent that solid-waste activity is conducted outside of the original shipping container. See section 10908(e)(1)(H)(i) 2[4]. The CRA does not apply to any facility or portion of a facility that does not meet all of these factors. Whether a facility would fall within the state's or the Board's jurisdiction appears to depend upon which of those criteria the facility does not meet. For example, if a facility meets all other criteria but is not owned or operated by or on behalf of a rail carrier, then the Board has no jurisdiction. If, on the other hand, a facility meets all other criteria but the activity conducted at the facility is limited to transferring solid waste in the original shipping container, then the facility falls under the Board's general jurisdiction, not the Board's jurisdiction under the Clean Railroads Act.

(CRA Decision, pp. 4-5; emphasis added)

The CRA Decision further states that, under the Clean Railroads Act, "the Board may issue land-use-exemption permits only for solid waste rail transfer facilities that are or are proposed to be operated by or on behalf of a rail carrier." This language in the CRA Decision establishes that Coastal and NYAR are mistaken in claiming that "the permitting and operation of solid waste rail transfer facilities, without regard to whether the operator is or is not a railroad, or an agent of a railroad, has been removed from the STB's jurisdiction." (Reply, p. 5.) If the operator of a solid waste transfer facility is not a rail carrier or acting on behalf of a rail carrier, the Clean Railroads Act is wholly inapplicable. If, on the other hand, the operator of a solid waste transfer facility is a rail carrier or acting on behalf of a rail carrier, the Clean Railroads Act applies and the Board may issue exemptions. (CRA Decision, p. 10, emphasis added). The Board therefore continues to have jurisdiction to decide whether solid waste transfer facilities are operated by or on behalf of rail carriers.

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In its September 26, 2008 decision on Coastal's petition for reconsideration in this case, the Board ruled that, "where, as here, a non-rail carrier is operating a transload facility for its own benefit, it is not subject to the Board's jurisdiction." Town of Babylon and Pinelawn Cemetery - Petition for Declaratory Order, STB Finance Docket No. 35057, p. 4, 2008 STB LEXIS 499 (September 26, 2008). See also Town of Babylon and Pinelawn Cemetery - Petition for Declaratory Order, STB Finance Docket No. 35057, p. 5, 2008 STB LEXIS 58 (February 1, 2008) ("we find that the facts of this case fail to establish that Coastal's activities are being offered by NYAR or through Coastal as NYAR's agent or contract operator"). Since Coastal's facility is neither owned nor operated by or on behalf of a rail carrier, it cannot satisfy all four factors needed to qualify as a "solid waste rail transfer facility," and it is not subject to the Clean Railroads Act. For this reason, the Board's conclusion that Coastal is subject to local regulation remains valid. See Town of Babylon and Pinelawn Cemetery - Petition for Declaratory Order, STB Finance Docket No. 35057, p. 1, 2008 STB LEXIS 499 (September 26, 2008).

Based on the Board's conclusion that Coastal is neither a rail carrier nor acting on behalf of a rail carrier, Coastal is also mistaken in claiming that its facility is eligible for treatment as an "existing facility" under 49 U.S.C. § 10908(b)(2)(B). The procedure set forth in Section 10908(b)(2)(B) is only applicable to solid waste rail transfer facilities which existed when the Clean Railroad Act became law last October. While Coastal may have been operating a solid waste facility when the Clean Railroads Act was enacted, it has never operated a solid waste rail transfer facility. Accordingly, Coastal is incorrect when it asserts in its reply that it acted "[u]nder the authority of the Clean Railroads Act" in seeking a permit for its existing facility from the New York State Department of Environmental Conservation (the "DEC"),¹ and is now subject to only state regulation pursuant to the terms of the Clean Railroads Act. (Reply, p. 2.)

In addition to offering an interpretation of the Clean Railroads Act that the CRA Decision establishes is wrong, Coastal and NYAR make two other arguments in their reply, neither of which has any merit. They contend that (1) by filing a petition for review with the Court of Appeals for the District of Columbia Circuit, they divested the Board of jurisdiction to consider our petition, and (2) the Board lacks jurisdiction to rule on the issue raised in the petition because its expertise is not required to eliminate uncertainty. For the reasons set forth below, Coastal and NYAR are mistaken.

¹ The Consent Order between Coastal and the DEC makes clear that the DEC has in the past been confused or misled about the Board's jurisdiction over Coastal and remains confused. Paragraph 4 of the Consent Order states that the DEC had previously determined that it was preempted from regulating Coastal's activities because Coastal was subject to the Board's exclusive jurisdiction. The Board's decisions in this docket establish that that determination by the DEC was wrong. The DEC's current belief that Coastal is subject to the Clean Railroads Act is equally mistaken.

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With respect to the argument that the Board lacks authority to rule on this petition because Coastal and NYAR filed petitions for review of the Board's earlier decisions in this docket, the law makes clear that the filing of an appeal does not prevent an agency from taking further action which would not interfere with the administrative process. Bell v. New Jersey, 461 U.S. 773, 779-780, 103 S.Ct. 2187, 2191 (1983) (where agency has issued "definitive statement of its position, determining the rights and obligations of the parties," agency's action is final for purposes of judicial review despite "[t]he possibility of further proceedings in the agency" on related issues provided "judicial review at that time [would not] disrupt the administrative process"). Applying this test here, the Board's prior decision are definitive, and judicial review will not disrupt the administrative process.

Coastal and NYAR are also mistaken that the Board's expertise is not implicated by our petition. As the CRA Decision makes clear, the Board has been given certain responsibilities under the Clean Railroads Act and, in carrying out those responsibilities, it has presented its interpretation of the Act. (CRA Decision, p. 4.) An agency's interpretation of an act it administers is entitled to substantial deference. Aluminum Co. of America v. Central Lincoln Peoples' Utility District, 467 U.S. 380, 390, 104 S.Ct. 2472, 2479 (1984) ("We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference") (citation omitted), Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 2782 (1984) (it has been "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations").

In this case, not only does the Board have the authority to determine whether its prior decisions are affected by the Clean Railroads Act, it is in the best position to do so.

Respectfully,



Fran M. Jacobs

cc: John F. McHugh, Esq. (by FedEx)
Ronald Lane, Esq. (by FedEx)
Howard M. Miller, Esq. (by FedEx)